UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 20-22476-mg

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In the Matter of:

FRONTIER COMMUNICATIONS CORPORATION,

Debtor.

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United States Bankruptcy Court

One Bowling Green

New York, NY 10004

March 27, 2024

10:00 AM

B E F O R E :

HON MARTIN GLENN

U.S. BANKRUPTCY JUDGE

ECRO: KS

HEARING re Hybrid Hearing RE: FRONTIER'S MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(C) WITH NOTICE OF MOTION AND EXHIBITS THERETO filed by John P. Campo on behalf of Frontier Communications Corporation. (Document no. 2235, 2246, 2248, 2249, 2258, 2280, 2298, 2304)

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

CLERK: All rise.

AUTOMATED VOICE: Recording in progress.

THE COURT: Please be seated. All right, good morning, everyone. Good morning. We're here for the argument on Frontier's 12(c) motion. Who's going to argue for Frontier?

MR. CASTILLO: I will, Judge. Good morning, Chief Judge Glenn. Frontier's motion --

THE COURT: You just -- everybody needs to remember, each time you speak, you need to identify yourself because --

MR. CASTILLO: Ruben Castillo.

THE COURT: Okay, Mr. Castillo.

MR. CASTILLO: -- for the reorganized Debtor --

THE COURT: Thank you.

MR. CASTILLO: Frontier Communications.

THE COURT: Go ahead.

MR. CASTILLO: Frontier's motion presents a purely legal question, Your Honor. For the purposes of this motion, we are not challenging the pled facts. The narrow legal question will resolve all the claims pending before the Court. The issue is whether the failure to terminate ongoing internet services constitutes an actionable material contribution to infringement by internet subscribers.

We submit that existing Second Circuit law, Supreme Court law, especially the Twitter case, hold that the failure to terminate internet services is not an actionable material contribution to infringement. This is so because the failure to terminate is an act of omission and not a concrete active commission that materially contributes to infringement.

The claimants focus on the same allegation over and over again in their claims pending before this Court. Frontier failed to terminate customers. This is a classic case of passive inaction that was rejected by the Twitter court. This Court will be one of the first Courts to apply Twitter to an internet service provider, but there's nothing unusual --

THE COURT: May I ask you this question?

MR. CASTILLO: Yes.

THE COURT: Do you think that the Fourth Circuit's decision in Sony v. Cox is just simply wrong?

MR. CASTILLO: Absolutely.

THE COURT: Okay.

MR. CASTILLO: Absolutely wrong. Absolutely ignores Twitter. They were put on notice about the Twitter decision, which unfortunately came after that case was argued via letter writing procedures provided by the appellate rules and they just totally ignored the Twitter

decision.

THE COURT: May I ask you this? Do you think that any circuit in your view got it right?

MR. CASTILLO: Haven't had that opportunity. The circuits haven't had that opportunity to do that, so --

THE COURT: You would acknowledge that every circuit that's ruled on the issue of contributory infringement has found that properly pleaded, that the claim can properly be stated, right? I mean, you're essentially -- yeah --

MR. CASTILLO: Properly pleaded -- yeah.

THE COURT: You're arguing --

MR. CASTILLO: Contributory infringement --

THE COURT: Well, you are.

MR. CASTILLO: -- pleaded, can proceed, Your Honor. Because that would be --

THE COURT: In your view, no Court, District Court or Circuit Court has gotten it right.

MR. CASTILLO: Haven't had the opportunity to apply to it or, let's put it that way -- the only --

THE COURT: Well, stop. I really -- I'm going to let you argue.

MR. CASTILLO: Okay.

THE COURT: But I do want --

MR. CASTILLO: Sure.

THE COURT: -- answers to my questions.

MR. CASTILLO: I will --

THE COURT: In your view, no District Court or Circuit Court that has reviewed issues of contributory infringement, copyright infringement have gotten it right?

MR. CASTILLO: That's not our view, Judge.

THE COURT: What case got it right?

MR. CASTILLO: The Second Circuit.

THE COURT: Which case?

MR. CASTILLO: Gershwin is one. Matthew Bender is another. Those are two classic Second Circuit cases. Gershwin focused on causing or materially contributing to the infringing conduct of another. There, you had a concert promoter who was taking action, putting together concerts with copyrighted works and with selecting those copyrighted works. Matthew Bender --

THE COURT: Let me ask the question.

MR. CASTILLO: Okay.

THE COURT: In your view, does any case district or circuit, that deals with contributory infringement claims against an ISP, did any of them get it right?

MR. CASTILLO: An ISP?

THE COURT: Yes.

MR. CASTILLO: No. That's our view. Matthew Bender, the case, I was just talking about, dealt with CD-

ROM versions of West opinions and the Matthew Bender Second Circuit case, that was 1998, talks about two types of contributory liability. The first is personal conduct that encourages or assists the infringement. So, Matthew Bender, in our view, predicted where Twitter was going to go.

The second type of contributory liability is for provision of machinery or goods that facilitate the infringement. But then Matthew Bender applied the 1984 Sony VCR Supreme Court case that evaluates if the goods or equipment are capable of substantial non-infringing uses. Matthew Bender was not held liable because it did not influence or encourage any unlawful copying and its product was capable of substantial non-infringing uses.

Let me just pause for a moment since I mentioned the Supreme Court Sony case, the VCR case from 1984 and compare that to Frontier. The VCR and the internet are both capable of substantial non-infringing uses. So there's a total comparison there. The Supreme Court also evaluated whether or not Sony's advertisements created some encouragement to infringe, because Sony advertised its VCR in a way to encourage owners to build their "own VCR libraries and collection."

And that was held not to be encouraging and that's very similar to the only, the only Frontier advertisement cited in the claims where Frontier says you can download ten

songs in 3.5 seconds. Both Sony's advertisement of building your own VCR collection as well as Frontier's, you can download ten songs in 3.5 seconds, these are not advertisements that are necessarily speaking about infringing conduct.

Both of those things, building a VCR library or downloading music can be perfectly legal. So we urge this Court to follow the Supreme Court's Sony case and it's that this advertisement alone is not affirmative culpable conduct.

So, what is affirmative culpable conduct? Knowledge of misuse is not enough. That gets me to MGM Studios v. Grokster, 2005 Supreme Court case, which involves a peer-to-peer network that allows persons to download and distribute music. This is very much like the BitTorrent technology present in our own case. The Grokster case was all about an infringement business.

That was their business model and Grokster, the Supreme Court holds that one who distributes a device with the object of promoting its use to infringe as shown by the clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.

So a defendant cannot avail itself of the Sony substantial non-infringement use defense if its actions or

statements promote infringement. The sufficient affirmative culpable conduct in Grokster was, one, customer advice on how to access copyrighted works on its network; two, distribution of articles promoting the software's ability to access copyrighted materials. In fact, Grokster conceded most of the music downloads on its systems involved infringement.

So even while holding Grokster liable, the Supreme Court stated in that case previewing last year's Twitter opinion, "Mere knowledge of infringing potential or actual infringing would not be enough to subject a distributor to liability." One searches in vain for purposeful culpable conduct by Frontier in the claims before the court.

THE COURT: Even where you -- even where it really is undisputed that Frontier received numerous repeated --

MR. CASTILLO: Notices.

THE COURT: -- notices of --

MR. CASTILLO: It's not disputed and we're not contesting that for purposes of this motion. But even knowledge of actual infringement is not enough to subject someone to liability.

THE COURT: It wouldn't matter in your view if the record companies sent 1,000 notices of infringement by the same subscriber? That wouldn't be a basis for liability on the part of Frontier?

MR. CASTILLO: Not a basis for liability with the mere provision of internet services. Not a basis for liability. So, in the claims before the Court, there's nothing about advertisements other than you can download ten songs in 3.5 seconds, which is not necessarily infringement. There's no publicity about, you need to use our internet service for infringement. There's no direct actions to encourage infringements or how to illegally access copyrighted music.

Instead, the claims before the Court are based on a failure to terminate internet services. That's -- internet services are substantially non-infringing services, which brings us directly to the Supreme Court's Twitter case from May 18th of last year. Twitter, in our view is just a natural progression to communication services in general. This is a nine to nothing case which the claimants would love this Court to ignore because it's the final torpedo that sinks their ship, which was already flawed under Grokster.

THE COURT: Can you tell me this, Mr. Castillo? In how many of the ISP infringement, contributor7 infringement cases has Twitter been raised?

MR. CASTILLO: It was attempted to be raised in the Fourth Circuit Cox case.

THE COURT: Anywhere else? You're pretty --

you're certain about that?

MR. CASTILLO: To my knowledge, has not.

THE COURT: All right. Go ahead.

MR. CASTILLO: Okay. The Twitter case involved Facebook, Google, and Twitter. They are hosting platforms that unlike the internet could be monitored. The hosts, Facebook, Google, and Twitter made profits by selling advertisements to go with the posts. The Twitter Court again, following the Second Circuit, says that to have aiding and -- the aiding and abetting liability, you need to focus on conscious, culpable conduct, an affirmative act.

The Court was leery about imposing aiding and abetting liability for mere passive nonfeasance. So, let's look at the specific allegations in Twitter because I think they say a lot. In Twitter, the allegations were ISIS used platforms for years as tools for recruiting, fundraising, and spreading propaganda.

THE COURT: But the terrorist attacks that were involved in Twitter did not occur on internet platform, correct?

MR. CASTILLO: The terrorist attack did not occur using the platform. Correct.

THE COURT: And there were no allegations that the platforms were used to plan or coordinate the attacks.

MR. CASTILLO: That's true. That's true.

THE COURT: And there were no allegations that the platforms had specific notice of the wrongdoing, correct?

MR. CASTILLO: They had notice of the wrongdoing.

THE COURT: Did they have notice of the specific terrorist attacks that were planned?

MR. CASTILLO: They did not have specific knowledge of the Turkey attack.

THE COURT: So, don't those concessions materially distinguish this case from Twitter because here the wrongdoing allegedly occurred on Frontier's platform?

MR. CASTILLO: Again, the wrongdoing, we do not think they distinguished it because the wrongdoing that occurred in Twitter was terrorism in general and the -- in Twitter, they're using these platforms to fundraise for these weapons that are then used in attacks, but it wasn't linked to that specific attack. That part is true. In our case, there is the infringing that's going on, but all we're doing is providing a service. We do not have knowledge of what specific things are being done by Frontier customers.

In Twitter, the ISIS video and messages celebrated terrorism and recruited new terrorists. They actually posted videos of executions and killings to fundraise, as I said, for specific weapons of terrorism. The platforms were, according to the allegations, crucial to ISIS' growth. And this gets to your question, Your Honor. Defendants knew

ISIS was using its platforms in this manner.

Then, there was even a more specific allegation that Google reviewed and approved some Isis videos and shared advertising revenue for these videos with ISIS. All of these specific allegations were found insufficient. And the Supreme Court affirmed dismissal of the complaint, because just like the claimants in this case, the Supreme Court says, "At bottom, the claim rests less on affirmative misconduct and more on alleged failure to stop ISIS from using these platforms."

And that's exactly what the claimants are claiming here before this Court, that we failed to stop these infringers from using the internet platform that we created. But the Twitter Court says "Mere creation of platforms is not culpable." Then, the Twitter Court goes on to say, "Plaintiffs identified no duty that would have required defendants or other communication services" -- they say, or other communication services -- "to terminate customers after discovering their customers were using the service for illicit ends."

There's no common law duty, no other statutory duty. It's the same as in our case. And then they go on to say, "A contrary conclusion would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using the

services and failed -- failing to stop them. That would run roughshod over the typical limits of tort liability and (indiscernible) aiding and abetting from culpability."

I mean, there couldn't be a broader holding than that. Any sort of communication provider from any sort of wrongdoing? I submit to this Court, the Supreme Court knows how to limit its opinions when it needs to. There was no limitation on that wording at all by the Supreme Court.

Now, the claimants might try and limit this broad holding to just terrorists and social media platforms, so let's see what the Twitter Court specifically says about internet providers like Frontier. The Court goes on to say, "The mere creation of these platforms is not culpable. To be sure, it might be that bad actors like ISIS use platforms for illegal and sometimes terrible ends, but the same could be said of cellphones, emails, or the internet generally."

We generally do not think -- just another quote -- "We generally do not think that the internet or cellphone providers incur culpability merely for providing services to the public writ large, nor do we think such providers would normally be described as aiding and abetting."

Then they go on to use a drug deal example. Should a phone company be liable because they know that the phones are being used in a drug deal? And they reject that type of liability. It's no different than if someone put

the phone company on notice that a specific house was being used by drug dealers. Would that phone company be liable because they didn't cut off the phone services to that specific house or address or apartment? The answer is no, because providing services like internet services is simply not enough, and the failure to terminate internet services is not the required intentional affirmative conduct.

At best, it's passive nonfeasance according to the Supreme Court. So, we believe that claimants are trying to force the round peg, a failure to act, through the square hole of affirmative conscious culpable behavior. This creative effort should be rejected by this Court.

All the secondary copyright claims including the movie specific 1202 claim should be to dismissed, because they're based on the same flawed contributory allegations. As to the vicarious liability claims, will -- the these also should be rejected for reasons stated in our brief. We can rest on our brief, but it's sufficient to say Frontier has no control and no direct financial tie to any infringement.

I'll reserve any remaining time for either questions by this Court or rebuttal, Your Honor.

THE COURT: Let me ask you this. You're relying the Second Circuit's Matthew Bender decision.

MR. CASTILLO: Yes.

THE COURT: What specifically in that decision,

are you relying on?

MR. CASTILLO: They found --

THE COURT: Let me just say --

MR. CASTILLO: Yeah.

THE COURT: You quote, excerpts --

MR. CASTILLO: I do.

THE COURT: -- quotes from the decision in your brief.

MR. CASTILLO: Yeah.

THE COURT: And that doesn't seem -- tell me again. I don't understand why you think Matthew Bender controls this case.

MR. CASTILLO: Matthew Bender controls this case because they -- that Court did not --

THE COURT: -- at Page 10 in your brief, you say -- you have a parenthetical. You say, "In any event, we think the substantial non-infringing use test is inapplicable here, as it was in Sony. The Supreme Court applied that test to prevent copyright holders from leveraging the copyrights in their original work to control distribution of (and obtain royalties from) products that might be used incidentally for infringement but that had substantial non-infringing uses." That's the end of the quote.

MR. CASTILLO: Right.

THE COURT: I don't see why that --

MR. CASTILLO: You have a product --

THE COURT: -- bears -- let me finish my question.

MR. CASTILLO: I'm sorry. I didn't realize you didn't finish your question, Judge.

THE COURT: I'm slow with getting my questions.

MR. CASTILLO: No, that's okay.

THE COURT: That seems to miss the mark here. Why do you think -- is there some other quote in Matthew Bender that you think --

MR. CASTILLO: Matthew --

THE COURT: -- is more pertinent to our case now?

MR. CASTILLO: Well, there's a quote in Matthew Bender that says you can't infer infringing intent just from the fact that a product might be misused. And I think that's exactly --

THE COURT: And they don't -- record companies and movie companies don't rely on some presumption of infringing intent, and the fact that ISPs can be used for infringement. They're relying specifically on a series of notices that advise you that subscribers were infringing their copyrights.

MR. CASTILLO: No, they're trying to use these notices to then get this Court to speculate that there is some type of infringing purpose --

THE COURT: Not speculate. I mean, they'd have to prove that, but these are not -- they haven't argued that a single infringement notice is enough to impose liability on Frontier or any other ISP, but -- and I do have a question about how many notices before there'd be liability, but if there are hypothetically, ten infringing notices that a subscriber within a six-month period had infringed copyrights of protected works, why wouldn't that be sufficient to require Frontier to act?

MR. CASTILLO: Ten infringement notices can be generated in one day, Your Honor, in one day. So, that's what I will tell you, so we're pulling these numbers out of whole cloth just like the claims in this case and --

THE COURT: Well, I'm picking them out of the air as examples. What about a thousand? I don't know. But you're --

MR. CASTILLO: Again, we're just pulling these numbers, you know, what is sufficient --

THE COURT: What about a hundred a week for ten weeks? Is that -- that wouldn't be enough to establish to -- as a basis for imposing liability of an ISP?

MR. CASTILLO: It's a basis for showing knowledge. It's a basis for showing knowledge, but then you need an act on the part of Frontier.

THE COURT: The act is, you don't cut them off.

You continue to permit a subscriber who you've received notice of repeated infringement to continue to use your platform and you know --

MR. CASTILLO: That --

THE COURT: Plaintiffs argue that -- the claimants here, plaintiffs in the District Court -- argue that that establishes, that that knowledge is sufficient to impose liability on an ISP.

MR. CASTILLO: And that's where we run squarely into Twitter, which is --

THE COURT: And that's where every other -- every other case that's dealt with an ISP and imposed liability, you think is just wrong. Right? That's your position.

MR. CASTILLO: There aren't that many cases, but the cases from other circuits we think are wrong, the pre-Twitter cases, because Twitter says failure to terminate services is not enough --

THE COURT: Let me just come back. I want to be -- I want to be clear about this. Other than this one -- I have your brief open on the screen.

MR. CASTILLO: Yeah.

THE COURT: Okay. Other than this one parenthetical from Matthew Bender, 158 F.3d 707 I quoted, that's the only place in your brief that you even cite Matthew Bender.

MR. CASTILLO: That's our opening brief, Your Honor?

THE COURT: Yes.

MR. CASTILLO: Yeah, I think that's correct.

THE COURT: Okay. Should I look at your -- do you have a reply brief that you think places greater emphasis on Matthew Bender?

MR. CASTILLO: I would have to look at that. I'm not sure, as I stand here.

THE COURT: Is there something in Matthew Bender other than this one sentence that you quoted in your opening brief in a parenthetical that you believe applies to this case here?

MR. CASTILLO: It's the fact that Matthew Bender is looking for some expression of infringement encouragement. That, I think, is the key to Matthew Bender and there's none, so there's no finding of liability.

THE COURT: All right.

MR. CASTILLO: Thank you, Judge.

THE COURT: Thank you very much, Mr. Castillo. Mr. Oppenheim?

MR. OPPENHEIM: Good morning, Your Honor.

THE COURT: Good morning.

MR. OPPENHEIM: For Your Honor's benefit, we have representatives from Sony Music and ABKCO here today, David

Jacoby and Will Pittenger, among all the other counsel as well. I will handle the bulk of the argument in response to the 12(c) motion, but Mr. Culpepper, I believe, will be handling the 1202 portion of the argument.

THE COURT: Okay.

MR. OPPENHEIM: So, we're trying to divide it efficiently, Your Honor.

THE COURT: Thank you.

MR. OPPENHEIM: I'll divide my argument into four pieces, Your Honor. First, I think we need a little bit of a reset on the factual allegations in the case. Two, I'll talk about Sony and Grokster. Three, I'll talk about Twitter, and lastly address the vicarious liability claim.

As a starting point, Your Honor, it's important to remember that this is a case about Frontier providing high speed --

THE COURT: You didn't do so well on the vicarious liability in Cox.

MR. OPPENHEIM: And I'm prepared to address that.

THE COURT: Okay. I'm tweaking -- I saw the order denying the rehearing in the Circuit.

MR. OPPENHEIM: Needless to say, I disagree with it, but --

THE COURT: You did pretty well in the case in the trial court, but --

MR. OPPENHEIM: I believe the Second Circuit law is completely inconsistent with the Fourth Circuit's decision in Cox and we'll get that on the vicarious liability issue. So, this is a case about Frontier providing high speed internet service to known repeat infringers and Frontier's profiting from those repeat infringers' continued use of those -- that service after Frontier should have terminated them.

So, Frontier wants to pretend otherwise. The allegations in this case are not that Frontier is some passive provider of infrastructure. Fundamentally, Frontier knew it had an obligation to terminate repeat infringers. Its acceptable use policy make clear that it would terminate repeat infringers. Yet, Frontier's internal policies and procedures made a mockery of that acceptable use policy.

Frontier in its reply brief argues that its actions were equivocal inaction and passive nonfeasance, and argues that the record companies have not alleged culpable conduct. That's simply not true. The claims that are set forth are not only culpable, they're willful and intentional, though we don't even need to show that. So, between May 1st, 2019 and July 28th, 2023, Frontier received well over 50,000 individual notices that one of its subscribers was contemporaneously engaged in the illegal distribution of plaintiff's copyrighted sound recordings.

THE COURT: fifty thousand notices as to one subscriber?

MR. OPPENHEIM: No, no, fifty -- over that period of time, 50,000 total. But the point is that those notices were sent generally within 24 hours of identifying the infringement and contrary to what Mr. Castillo was suggesting, generally, the plaintiffs would not send more than one notice per day unless that same subscriber was found distributing two different sets of torrents on two different aspects of BitTorrent.

Frontier's procedures for responding to the notices changed over time, but up until at least June 29th, 2020, Frontier's internal policy was to completely ignore the first 14 infringement notices, essentially throw them in the trash. It wasn't until the 15th notice regarding that same subscriber, that Frontier would even email a warning to the subscriber to let the subscriber know that they had been identified as infringing.

And when they did email them, they would tell the subscriber that their account was in jeopardy, but otherwise, would allow the subscriber to continue to use the service. On the 25th notice with respect to a particular subscriber, Frontier sent a slightly more, what they call harsh warning email, but otherwise did nothing.

Even after 100 notices with respect to a

particular subscriber, all Frontier would do is send a subscriber an electronic warning. Now, this is not an email but an electronic warning on the computer system called a walled garden, where the subscriber would have to acknowledge that they had been notified about the infringement.

And what we already know from the data, the limited data we have, which is -- we have not yet gotten through, is that there were well over 2,900 subscribers who were the subject of at least 100 notices each. Now, that's based on the IP addresses. We expect that those numbers are going to change dramatically as we start looking at the data that's just been produced.

And each Frontier subscriber that was illegally distributing the plaintiffs' sound recordings were doing so on a continuous basis worldwide on a network that was built for viral distribution. That is, when that subscriber distributed to somebody else that somebody else would then distribute it to numerous other people.

So, while the ultimate loss to the plaintiffs in terms of the number of illegal recordings that were distributed is incalculable --

THE COURT: How many notices -- how many infringement notices are sufficient in your view to predicate liability?

MR. OPPENHEIM: We -- so Your Honor --

THE COURT: What position have you taken in other cases?

MR. OPPENHEIM: The position we're taking here, which is consistent with the position we've taken in other cases is that when a subscriber is the subject of three or more notices, liability should attach. And that's consistent with generally the concept of three strikes. YouTube, for example, has a three strikes rule, right? Other systems have a three strike rule and God knows American baseball can't be wrong.

THE COURT: Have any of the District or Circuit Court decisions specifically addressed the issue of how many notices are enough to predicate liability?

MR. OPPENHEIM: Not that I'm aware of, Your Honor. Not that I'm aware of.

THE COURT: Okay.

MR. OPPENHEIM: While Frontier claims it terminated repeat infringers, we're not aware of a specific policy that Frontier had that would lead a subscriber to be terminated. And much like the Grande case, the absence of a policy that set forth the specifics of how termination would occur, there should be no safe harbor. So, the facts as I've just laid them out don't support Frontier's argument that they weren't culpable, but rather they set forth

evidence that Frontier's conduct was frankly willful.

So Your Honor put your finger on it. There have been 12 secondary infringement cases brought against ISPs in addition to this one. All have alleged a similar contributory infringement theory that continuing to provide service to known repeat infringers makes the ISP liable. Not a single one of those has dismissed a contributory infringement claim on the pleadings. The defendants moved to dismiss the contributory claim in eight of those cases. Those motions have all been denied seven times. There's one still pending in the second Altice case.

So, let me turn to Sony and Grokster, Your Honor. Contrary to Frontier's argument, Sony and Grokster actually support liability over Frontier here. Every Court to consider these issues has held that an ISP is liable consistent with Sony and Grokster. So the common law background which Mr. Castillo referred to is the Gershwin case. One, who with knowledge of the infringing activity induces, causes, or materially contributes to the infringing conduct of another may be held liable as a contributory infringer.

That's the language of the Second Circuit, but it's also the language that the Supreme Court relied on in the Grokster case. So it is the law of the land. Frontier's reading of Sony is completely wrong. Sony did

not immunize all sales of services with substantial non-infringing uses. Grokster explicitly rejected that concept. So, the history of the Grokster case tells the story. It was unfortunately a history that I had to live through the first several rounds of. I litigated this case personally.

So, the District Court granted summary judgment to the defendants in that peer-to-peer case based on the Sony decision. The District Court interpreted Sony, told that any service that had substantially non-infringing uses were immune from liability, much as Mr. Castillo has argued here today. The Ninth Circuit, unfortunately, affirmed that decision.

So, it goes up to the Supreme Court and the Supreme Court reversed nine to zero, and the Supreme Court said that the Ninth Circuit and the District Court's interpretation of Sony was incorrect, and went on to expand secondary liability to explicitly say it's not just material contribution, it includes inducement. The Court in no way said that knowledge and material contribution did not remain a viable theory. In fact, the Supreme Court cited traditional Gershwin case for that proposition. Nor did it hold that there can be no liability for service providers without proof of the inducement found in Grokster.

So, while the Supreme Court expressly stated that the District Court's decision in Grokster on Sony was wrong,

it didn't tell us how we should be interpreting Sony. We just know that what Mr. Castillo said has been explicitly rejected in the Grokster case. According to Grokster --= excuse me. The Grokster decision held -- excuse me.

The Grokster decision did not hold that the law absolves equivocal inaction, even if that was what Frontier was doing, which they're not. According to Grokster, where service has a substantial non-infringing use, Sony only requires a showing of additional evidence of statements or actions -- "statements or actions directed to promoted infringement beyond the mere distribution of the service itself."

Plaintiffs didn't sue Frontier on the theory that maybe its subscribers were infringing. Plaintiffs sued Frontier after sending tens of thousands of notices of infringement as to particular subscribers and particular infringement and that that infringement by those subscribers continued after notice.

Frontier is also different from Sony because in Sony, it was a disconnected product. In Sony, the movie studios and Mr. Castillo said it was the VCR, it was actually the Betamax, which frankly many of our kids don't even remember. But the beta -- the theory in the Sony case was that the Betamax could theoretically be used to infringe, and what we have here is very different. It's not

just that they -- that Frontier had knowledge.

They have a service that has an ongoing relationship with the subscriber that the Betamax did not have. They have the ability to control the service after they've sold it, where the manufacturer of the Betamax did not, and that's a substantial and critical distinction.

Let me turn to the Twitter decision, Your Honor. So, there are three reasons that the Twitter decision does not apply here. On the face of the case, there's nothing to suggest that that the case applies to copyright. It says nothing about copyright law and it would make no sense that the Supreme Court would silently rewrite large swaths of copyright law in a case that is on an entirely unrelated issue.

In Twitter, the Supreme Court was considering the application of the Halberstam framework for aiding and abetting liability in the context of a social network platform accused of aiding and abetting terrorism. That Halberstam framework was established in 1983 by the D.C. Circuit, largely adopted by other circuits.

THE COURT: Excellent pin.

MR. OPPENHEIM: Yeah, it's been widely adopted. That framework was in place and widely adopted at the time that the Supreme Court decided Grokster in 2005 and yet nothing in the Grokster decision looks to the Halberstam

framework and says, no Grokster shouldn't be held liable on an aiding and abetting theory. So, the Fourth Circuit was given the opportunity to dismiss the claims, vacate in full the Cox decision on the basis of Twitter. It chose not to, and Cox then repetitioned -- petitioned for rehearing en banc based on its failure to address Twitter, and the Fourth Circuit denied that petition. Twitter doesn't radically change the law. Second --

THE COURT: Have you been back in the District Court yet?

MR. OPPENHEIM: No, we have not. And the mandate has -- was just temporarily stayed. Even if Twitter were to apply under Twitter's standard, Frontier's conduct has the direct nexus to its subscriber infringement that is necessary for Frontier to be held liable. So, Twitter emphasized the lack of a direct nexus between the contribution and the illegal activity in that case, in the Twitter case.

So ISIS was not using the defendant's social networks, right, Facebook and others to carry out the terrorist attacks. Indeed, there were no allegations that the individuals who committed the terrorist act in Turkey that was at issue in the case ever used the defendant's social media services. So, contrary to what Mr. Castillo said, Twitter was not about the use of the platforms for

terrorism generally. The Twitter case is very specifically about the particular terrorist attack in Turkey.

The analogous conduct here would be if the repeat infringers were using Frontier's internet service to discuss infringement that then took place offline. But that's not what's happening here. This is a case where the alleged infringement occurred on Frontier's network.

THE COURT: That was the point I tried to make with Mr. Castillo.

MR. OPPENHEIM: Yeah.

THE COURT: As I see it --

MR. OPPENHEIM: The culpability missing in Twitter is present here. In Twitter, they lacked the knowledge that ISIS would in fact use its service to commit terrorism because ISIS did not use the service to commit terrorism. Here, by contrast, Frontier affirmatively acted and provided special treatment to known repeat infringers. Frontier chose deliberately to exempt its repeat infringer policy from the known repeat infringers. Frontier's -- contrary to what Frontier's argued, the Court doesn't need to adopt the Ninth Circuit simple measures test to hold that claimants' stated claim.

In Perfect 10 v. Amazon, the Ninth Circuit held that a computer system operator can be held liable if it has actual knowledge of specific infringing materials available

using its system. That's the Perfect 10 v. Amazon decision. Again, I don't think we need to get to the simple measures test which was raised, but if we do, it's just another articulation of material contribution.

Third, and this is really -- makes absolutely certain that the Twitter case can't apply. Defendant's interpretation of Twitter would completely upend the DMCA safe harbors. So the DMCA safe harbors are a carefully calibrated statutory scheme that Congress passed to allow a balance between internet service providers on the one hand and copyright holders on the on the other.

Congress recognized that ISPs could potentially be liable for its users' infringement. And so, it created these ISPs with very specific conditions, including the one that will be at issue before this Court at a later time, the adoption and implementation of a policy to terminate repeat infringers. If defendant's interpretation of Twitter is correct and means that a service provider can't be held liable, then the statutory safe harbors become completely irrelevant and the careful calibration and the balancing done by Congress gets thrown out the window because ISPs are always immune from liability.

THE COURT: Have you been able to get discovery of what Frontier's policy was?

MR. OPPENHEIM: We're working on it, Your Honor.

There's the policy that was stated to its user, the acceptable use policy, which says that they would terminate. Then it was there were -- they had their internal policies of how they would implement that policy, which as I laid out before, had this system which they didn't even notify their users that they had been caught infringing for the vast majority of notices, and they had no policy, as far as we can tell, for termination. They did it on a haphazard basis.

And then the third piece of it is, well, how did they actually implement it? What did they actually do when they received those notices? And that's the data we're just receiving now and trying to review, Your Honor.

We don't believe there will be any basis for them to claim the safe harbor here. But if the -- if Frontier is right, then the DMCA safe harbors basically are worthless and they're entirely irrelevant, and what Congress did means nothing. And that's not what the Supreme Court was doing in Twitter. The Supreme Court did not suddenly upend a large, significant copyright statute.

Your Honor, I'll turn to the vicarious liability claim. So, Frontier's opening brief didn't even address the vicarious liability claim. They raised it in their reply brief. For this reason alone, the motion on that claim should be denied. But more than that, Twitter has

absolutely nothing to do with vicarious liability, right? Various liability, there are two elements; the right and ability to supervise and direct financial interest. There is no requirement --

THE COURT: Have the music and record companies actually recovered against an ISP on the vicarious liability theory? I understand you did, but the Fourth Circuit disagreed --

MR. OPPENHEIM: And it's still an issue.

THE COURT: It's still an issue.

MR. OPPENHEIM: Yes.

THE COURT: Has liability established in any of the other ISP cases based on various liability?

MR. OPPENHEIM: The vicarious liability claim went forward and was litigated in the charter case before settlement was reached.

THE COURT: Do you really need it?

MR. OPPENHEIM: Pardon?

THE COURT: Do you really need it?

MR. OPPENHEIM: So in the -- it doesn't change the damages, Your Honor, at all. You can only be liable for infringement once, and it doesn't matter how you get there. But the claim is a viable claim and the claim should survive. And Plaintiff should have the right to proceed on it. And its dismissal in Cox is directly contrary to the

Second Circuit, Your Honor, in the MP3tunes decision, EMI Christian Music Grp. v. MP3tunes, 844 F.3d 79. It's a Second Circuit 2016 decision.

The Second Circuit said that an increase in subscribers or customers due to copyright infringement qualifies as an obvious and direct financial interest. Well, by analogy, retaining subscribers that you otherwise should terminate under your own policies is essentially increasing your subscribers under the MP3tunes language. And the claim is a viable claim. And that's a significant departure from what the Fourth Circuit held in the Cox case.

In the Cox case, there was specific evidence where the internal people within the ISP had sent emails back and forth, saying let's not terminate these subscribers because we don't want to lose the monthly income. And the Fourth Circuit said that is not a sufficiently direct financial interest. And in that respect, the Fourth Circuit and Second Circuit are directly at odds with each other.

Your Honor, I will leave it at that, unless Your Honor has any questions.

THE COURT: Just give me a moment, okay? I take your view is it that putting aside whether the Second Circuit or the Fourth Circuit standard on vicarious liability is the correct one, Twitter doesn't foreclose claims for vicarious liability.

MR. OPPENHEIM: Twitter --

THE COURT: Doesn't --

MR. OPPENHEIM: Twitter's -- at issue in the Twitter case is the contribution --

THE COURT: Right.

MR. OPPENHEIM: -- and knowledge elements. And those aren't elements of a vicarious liability claim. It doesn't speak to vicarious liability at all. So, no. For that reason, Twitter doesn't apply.

THE COURT: Okay. Thank you very much. Mr. Culpepper?

MR. CULPEPPER: May it please the Court, Kerry Culpepper, appearing on behalf of movie claimants. Couple -- - Your Honor asked about any cases establishing how many notices does it take to establish liability. I believe relevant are two cases, and although it was the context of the 512(i) Safe Harbor and BMG v. Cox, the Fourth Circuit stated that repeat means more than once. So in that case, two. And also the Second Circuit --

THE COURT: No, it means more than one.

MR. CULPEPPER: Yes. And also Viacom said the same thing in the -- I'm sorry -- the Second Circuit reached same conclusion in the Viacom decision. I don't have the complete sites for those, but I can provide those later, if Your Honor wishes.

Also, regarding the notices, I want to add the movie claimants' agent sent at the time of the pre-petition claims 189,000 notices to Frontier concerning ongoing infringement. And also, they weren't just notices, Your Honor. I sent a demand letter to Frontier on March 20th -- in March of 2020, and that letter detailed specific egregious IP addresses. There were four IP addresses for which 300 to 500 notices have been sent. And that was not over a period of days. It was over a period of some cases of more than a year. And of those four IP addresses, this is ongoing dispute, Frontier has stated in a letter that they don't even know who the customers were for three of those four IP addresses.

So I think that goes to Your Honor's question of how many notices are enough. We've gone way past three or 10 or 100 in this case. We're up to the -- in some cases, more than 500 notices.

I want to raise three -- well, also another point. Your Honor asked about any cases establishing by liability against an ISP. I believe there was one case cited in everyone's -- well, in Frontier's brief and in my brief -- the Millennium Funding v. 1701 case in Southern District of Florida. There, a VPN provider was held vicariously liable for copyright infringement and 1201 violations, I believe.

There are three points I'd like to raise. The

movie claimants filed certain pre-petition claims that included a claim for relief based upon 17 U.S.C. 1202. That's violations of the integrity of the copyright management information. Not only do --

THE COURT: They added some names or letters on a name and you're -- correct? That's what you're referring to?

MR. CULPEPPER: Yes. But it wasn't just random letters. They added the names of websites of notorious piracy sites. So add insult and injury. Not only did the movie claimants' work get pirated, the name gets changed to add the name of a notorious piracy website. That's the basis of the 1202 claims.

Also, the movie claimants, all of the movie claimants' post-petition administrative claims also included the same claim for relief based upon 17 U.S.C. 1202. But Frontier's Objection at Docket Entry 1818 does not include any legal arguments in opposition to these 1202 claims. In fact, there there's not any legal arguments opposing any of the movie claimants' claims in Frontier's objection. They just discussed the record claimants claims.

Now, there's a difference between 1202 and copyright infringement claims. And to that point, I submitted a supplemental authority. It's a decision of the District of Colorado in the WideOpen West case. There's 512

safe harbor for 1201 claims. So I just want to make that difference.

THE COURT: That's really not an issue today. I mean, this is the -- they're arguing that Twitter is determinative of the outcome.

MR. CULPEPPER: True, but I bring that up to emphasize that there's a difference between a 1202 claim and a 106 or 501 copyright infringement claim.

Now, in Docket Entry 1841, Frontier filed an amended proposed order that referred to the movie claimants' claims, but still Frontier never made any legal arguments opposing the movie claimants' claims.

Again, at Docket Entry 1951, Frontier filed a second proposed amended order referring to the post-petition claims. But once again, no legal arguments disputing the movie claimants claims. This isn't a surprise. I pointed this out in Paragraphs 8 through 11 of movie claimants' opposition brief. That's Docket Entry 2248.

In Frontier's reply brief at Docket Entry 2258, Frontier does not deny that it failed to address movie claimants' claims specifically, or the 1202 claims at all, in its omnibus objection. Rather, Frontier just argues that because the base of a secondary liability for the 1202 claims is the same as the copyright infringement claims, the 1202 claims should be dismissed.

But we're here on a judgment -- a motion for judgment on the pleadings. There's no pleading from Frontier that disputes the 1202 claims. So I would submit it'd be improper to grant Frontier's motion for judgment on the pleadings when they haven't even denied the claim in the pleading, particularly in view of a case that 11 U.S.C. 502 and 501, a claim is deemed allowed if it's not disputed. So in this case, the claims are prima facie evidence of the validity of their claim and Frontier hasn't made any specific arguments against these claims.

Second argument I'm going to make, opposing counsel started his argument by saying that he was focusing on just legal issues. But there is an important factual dispute here over whether Frontier really is just a conduit. And the movie claimants dispute that fact.

As movie claimants point out in their reply brief, Frontier assigns the IP addresses that its customers use. Frontier provides the modems and leases the modems those customers use to access the Internet. You know, this is a disputed point, and because this is a disputed point, movie claimants would submit that it's not appropriate to have judgment on Finally, one small point. Well, not a small point. You know, as I mentioned earlier, Frontier made its objections and omnibus objection, but it didn't include any arguments opposing the movie claimants' 1202 claims. I want

to note that omnibus objection violates Bankruptcy Rule 3007(d) because it doesn't any of the criteria -- the eight criteria for an omnibus objection.

Also, in Bankruptcy Rule 3007(e)(3), an omnibus objection must state the grounds of the objection to each claim and provide a cross-reference to the pages in the ominous objection pertaining to stated grounds.

The object -- I've looked through the plan, Frontier's plan in this case. There's no portion in the plan that modifies the procedure for omnibus objections. The plan has Section 7, a process for these optional claim resolution processes, but the rule for omnibus objection is not modified.

I note Your Honor presided over a case in the Roman Catholic Diocese of Rockville Centre. In that case, unlike here, the debtor filed a motion to the Court to modify the process for making omnibus objections, and Your Honor granted that request. So, in that particular case, the debtor submitted an omnibus objection where the debtor just argued that the claims -- the debtor is not liable. But there was no -- doesn't appear that any such motion was made in this case. For that reason, omnibus objection violates Rule 3007. Unless Your Honor has any questions --

THE COURT: Thank you very much, Mr. Culpepper.

Mr. Castillo?

MR. CASTILLO: Thank you, Judge. I'm going to address Mr. Culpepper first. We believe the objection that was filed on behalf of Frontier is broad enough to cover the motion that we filed today for judgment on the pleadings.

His argument about 1202 is even further removed. This alteration or the use of changing the movie titles, Frontier has not been alleged to have done anything to encourage that particular action, and we think it is covered by the flawed secondary liability theory that's before the Court. It just doesn't fly, after Twitter.

A lot of what you heard from Mr. Oppenheim about these notices -- and Your Honor asked absolutely great questions about how many notices are sufficient -- never been determined by any court, as far as we know.

Mr. Oppenheim is anxious, anxious to litigate the DMCA safe harbor. But that's not before the Court either. And he has conceded in his briefing that you can't bring an independent action for failure to have a safe harbor. That's just not before the Court. Does that upend a carefully calibrated DMC piece of legislation? Well, I hope Your Honor by now -- and I know you've looked at all these cases and DMC more than you'd care to -- DMCA -- that is not a carefully calibrated piece of legislation.

You know, if Congress wanted to say 10 notices, you need to terminate ISP, they could have done that. They

failed to do that. They just -- there's no duty to terminate under the DMCA.

THE COURT: Is it left to the Court's sort of interstitial --

MR. CASTILLO: Left to the Court --

THE COURT: Stop.

MR. CASTILLO: Yes.

THE COURT: Please don't interrupt me when I'm asking --

MR. CASTILLO: I'm sorry.

THE COURT: -- a question.

MR. CASTILLO: I thought you were done. Sorry. Bad habit.

THE COURT: I was in the middle of a... Okay.

MR. CASTILLO: Bad habit.

THE COURT: First time, forgiven.

MR. CASTILLO: Thank you.

THE COURT: Second time, forgiven. This time not.

MR. CASTILLO: Okay. If you say the legislation doesn't include a bright line number for how many notices beyond which there's potential liability, is it left to the courts for interstitial supplementation to decide on a case-by-case basis, if necessary, how many notices are required to trigger potential liability? That's the question.

MR. CASTILLO: I think, yeah -- if that's the

question, it's left for the courts to --

THE COURT: Okay.

MR. CASTILLO: -- determine.

THE COURT: And --

MR. CASTILLO: That's not a carefully calibrated piece of legislation at all. It's just left to the courts to determine what amount of notice is. But more importantly, as we point out in the briefing, an Internet provider is covered by 512(a) is not even subject to these notices. These notices --

THE COURT: Really?

MR. OPPENHEIM: Yes.

THE COURT: I think we have a fundamental disagreement about that.

MR. CASTILLO: Okay.

THE COURT: Maybe we have a fundamental disagreement. When they not subject to the notices, I think the issue from my standpoint is what are a sufficient number of notices to trigger common law contributory or vicarious liability? Do you agree or disagree with that? Not a question of whether the legislation -- a different issue has resolved this issue.

MR. CASTILLO: I agree with what you're saying, Judge. I'm just pointing out that the legislation. Didn't provide for notices to go to Internet service providers.

The legislation did provide for notices, takedown notices, to be sent to hosting services. But that was a whole different thing. And in fact, the notices in this case talk about it's either going to be a takedown notice or we're trying to impute knowledge to you. Those have been notices that are being used by the services used by the claimants in this case.

But the fact is, you know, Mr. Oppenheim joked about the baseball rule, three strikes and you're out, being good enough. You're left to whole cloth to try and decide that issue in terms of how many notices are sufficient. And that's the same situation

THE COURT: This is not a DMCA safe harbor issue, correct?

MR. CASTILLO: Excuse me, Judge?

THE COURT: The number of notices sufficient to trigger vicarious or contributory copyright infringement liability is not a DMC safe harbor issue, correct?

MR. CASTILLO: Absolutely correct.

THE COURT: Okay.

MR. CASTILLO: Absolutely correct. We're talking about whether or not contributory liability is present. And with regard to that, we're not looking to overrule the entire DMCA. Because as I made clear in my arguments, if Frontier had clearly expressed its advertisements or in its

actions some effort to get its subscribers to infringe, then the safe harbor analysis might be necessary on the backend. But we're not saying there's absolute immunity on the part of all Internet service providers. Quite to the contrary.

THE COURT: May I ask you this? Among the cases that have been decided -- not ones that have settled -- how many notices have courts determined to be sufficient to trigger potential liability. Mr. Oppenheim said there have been 12 cases involving ISPs.

MR. CASTILLO: Mm hmm.

THE COURT: I think he said one case talked about one or more. Well, I don't know how many more. What's your view on that?

MR. CASTILLO: My view is that a court hasn't raised the question --

THE COURT: Well, I'm raising the question right now.

MR. CASTILLO: Yeah, I understand.

THE COURT: I'd like your position on it.

MR. CASTILLO: My view on that, just it hasn't been -- it hasn't been -- if you're asking me --

THE COURT: But I'm asking your -- you're standing here, you're arguing this case before me.

MR. CASTILLO: Mm hmm.

THE COURT: And I want to know what your position

is as to how many notices are required for a single subscriber --

MR. CASTILLO: Mm hmm.

THE COURT: -- before potential contributory -- assuming you're wrong on Twitter, how many notices are required before there's potential liability for contributory copyright infringement by an ISP?

MR. CASTILLO: I think that's going to take an analysis of --

THE COURT: Well, I'm asking you right now. Do you have an answer --

MR. CASTILLO: I don't have an answer for you, Judge.

THE COURT: Okay.

MR. CASTILLO: I cannot pull a number out of my hat in terms -- I would need to know the circumstances of those --

THE COURT: What else would you need. Tell me what you'd need to know.

MR. CASTILLO: I'd need to have the circumstances of those notices.

THE COURT: What circumstances?

MR. CASTILLO: How many works are at issue? How frequent those notices came for a particular claim. All of that type of analysis I think would need to be done.

THE COURT: Okay. Elaborate on your -- you've identified the factors that you think are relevant. I'd like you to articulate further what you believe the criteria should be for a court, if I overrule your Twitter argument --

MR. CASTILLO: Mm hmm.

THE COURT: -- in considering vicarious or contributory copyright infringement liability on the part of an ISP.

MR. CASTILLO: All of the facts surrounding the notices that go to a particular claim in the case would have to be closely analyzed. And you know, in this case, for example, the record companies have before you thousands of copyright works. You have to evaluate what the notice history is for --

THE COURT: So (indiscernible) --

MR. CASTILLO: -- each one of those claims.

THE COURT: -- we're talking about a single I.P. address to which there are three to five hundred notices.

MR. CASTILLO: Mm hmm.

THE COURT: Would that be sufficient? If you're wrong on Twitter, is that sufficient to impose contributory or vicarious copyright liability?

MR. CASTILLO: I would have to know how those notices were generated. Was something being done? Is it

the same work that over and over again they're claiming is being downloaded by a person because they have their computer on? That could happen. So there's just a lot of factors. It's basically a mini trial on each one of those claims.

One thing to keep in mind, Judge, is the type of technology in each case is totally different. Like, the MP3 case, totally different technology than the general Internet. The MP3 case is hosting technology that can share music. So I think, you know, when Mr. Oppenheim talks about that as setting the standard for vicarious liability in the Second Circuit, you have to keep in mind the technology that's being used.

The same thing with Perfect Measures out of the Ninth Circuit, where you have a hosting technology, that's totally different. So that that's another thing that needs to be closely analyzed.

THE COURT: Let me come back to --

MR. CASTILLO: Yeah.

THE COURT: Mr. Oppenheim said that it was Frontier's policy --

MR. CASTILLO: Mm hmm.

THE COURT: -- to ignore the first 14 notices, and only 15 or after was an email warning sent. Was he accurate on that?

MR. CASTILLO: That would not be accurate. The first 14 notices were not ignored. Or he even went further, he said, basically thrown in the trash.

THE COURT: Well, I -- what was happening -- what did happen to the first 14 notices?

MR. CASTILLO: Frontier would analyze those notices before taking further action. Each one of the notices that Frontier ever received would be analyzed.

THE COURT: Tell me what the analysis would consist of.

MR. CASTILLO: How many times a work is part of the analysis.

THE COURT: Is that in a written policy? Yes or no?

MR. CASTILLO: I don't know the answer to that. I think --

THE COURT: At this stage, after all these years, you haven't discovered whether Frontier had a written policy with respect to what it should do --

MR. CASTILLO: There is a written policy as to the number --

THE COURT: Well, tell me what the policy was?

MR. CASTILLO: Well, the policy was to take action at one point on the 15th notice, and then it got changed and lowered.

THE COURT: Okay. But what -- you said to me --
MR. CASTILLO: Mm hmm.
THE COURT: -- that it would require --
MR. CASTILLO: Yeah.
THE COURT: -- an analysis. When would they do -- how many notices were required before Frontier would undertake an analysis of what the particular subscriber did?
MR. CASTILLO: As the analysis --
THE COURT: Would the analysis --
MR. CASTILLO: The analysis would be ongoing, Judge. That's all I can tell you.
THE COURT: So, after one notice of infringement it would -- it would do what?
MR. CASTILLO: After one, it would just be stockpiled until there were more notices.
THE COURT: Okay. So nothing other than stockpiling it after the first notice?
MR. CASTILLO: Well, it would be -- to be subject to further review later on.
THE COURT: How many notices would have to be received before further inquiry --
MR. CASTILLO: I don't think there was a hard number --
THE COURT: Could you let me finish my questions?
MR. CASTILLO: Oh, I'm sorry. I'm sorry, Judge.

I thought you were done.

THE COURT: Stop interrupting me.

MR. CASTILLO: Okay.

THE COURT: There is no way you thought I was finished with my question. If you would stop and listen.

MR. CASTILLO: Okay. Okay.

THE COURT: How many notices did Frontier have to receive before it would begin to conduct an investigation of the subscriber's conduct?

MR. CASTILLO: There is no hard line number.

THE COURT: Was any investigation of subscribers undertaken after receiving -- at the point which they received 14 notices?

MR. CASTILLO: Yes.

THE COURT: What was done?

MR. CASTILLO: To analyze --

THE COURT: What did they do -- I want you to tell me what they did. By this time in this case, you need to know.

MR. CASTILLO: What I can tell you is they would evaluate who the subscriber was, how many prior notices they had received, and look at the circumstances of the timing of those notices, which I think is critical.

THE COURT: Explain to me what you mean by the timing of the notices.

MR. CASTILLO: Are they coming in one after another, in the same day, over two days? Does it end. Does the behavior end?

THE COURT: Let me ask -- assume that they received 14 notices over a 60-day period. What was the policy? What was done?

MR. CASTILLO: It would depend on the prior history.

THE COURT: What do you mean?

MR. CASTILLO: Prior history of that particular subscriber. That's what I believe, Judge.

THE COURT: All right. Let me ask you -- Mr. Oppenheim raised the Gershwin case.

MR. CASTILLO: Uh huh.

THE COURT: Are you relying on Gershwin as well?

MR. CASTILLO: Yes.

THE COURT: And what is it about Gershwin that you believe supports your argument?

MR. CASTILLO: I'm glad you asked that. It requires some type of conscious behavior on the part of a defendant who's going to be held secondarily liable.

THE COURT: So, Gershwin says that at Page 1162 --

MR. CASTILLO: Uh huh.

THE COURT: -- that -- I'll pick up the quote in a moment -- but basically, secondary liability may be imposed

on "the common law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor." That's Gershwin at 1162.

MR. CASTILLO: Mm hmm.

THE COURT: Isn't that precisely what -- the circumstances here?

MR. CASTILLO: No.

THE COURT: Why not?

MR. CASTILLO: No conscious, culpable action being taken by Frontier, Judge.

THE COURT: Gershwin also said, "One who with knowledge of the infringing activity induces, causes or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer." That's at Gershwin --

MR. CASTILLO: Mm hmm.

THE COURT: -- Page 1162.

MR. CASTILLO: Right.

THE COURT: Isn't that exactly what this the allegations in this complaint are?

MR. CASTILLO: There is an allegation that we're materially contributing by continuing to provide services. That's the allegation.

THE COURT: If you know -- if you receive repeat

notices that a subscriber has infringed --

MR. CASTILLO: Mm hmm.

THE COURT: -- copyrights, don't you have knowledge of the infringing activity?

MR. CASTILLO: You have knowledge of the infringing activity, yes.

THE COURT: And aren't you materially contributing to the infringing conduct by continuing to allow that subscriber to improperly download music? Yes or no?

MR. CASTILLO: No.

THE COURT: Why?

MR. CASTILLO: Twitter says, continuing to provide services --

THE COURT: If you're wrong on Twitter --

MR. CASTILLO: What?

THE COURT: If Twitter doesn't stand for what you say, would you agree that when Frontier has knowledge of infringing activity by virtue of repeat notices that it's materially contributing to infringing conduct when it doesn't cut off the subscriber?

MR. CASTILLO: I would disagree.

THE COURT: Okay. All right? Anything else you want to add?

MR. CASTILLO: No, unless Your Honor has other questions.

THE COURT: No, I don't.

MR. CASTILLO: Thank you.

THE COURT: All right. You really don't need to.

MR. OPPENHEIM: I just wanted to clarify one issue.

THE COURT: Go ahead. Mr. Oppenheim, go ahead. You have to identify yourself by name.

MR. OPPENHEIM: Thank you. Matt Oppenheim, on behalf of the record company Plaintiffs. Just want to clarify one issue on what the notices apply to. So, there are two different issues. One is you've got this safe harbor, which Frontier has the obligation to prove it's an affirmative defense, and they have to show that they had a repeat infringement policy.

And so the question of how many notices is repeat under that statute, well, that, the Fourth Circuit in the Cox case did affirm three-plus was enough. So, there's that.

But the issue on establishing liability is really not number of notices. It's a question of whether the notices were sufficient to create knowledge under the law. And in that, that has generally gone to juries and the juries look at the quantum of the notices.

MR. OPPENHEIM: I understand that, Your Honor. I just wanted to make sure because of the conversation with

Mr. Castillo that those two things are actually different and that we clarified it.

And if Your Honor would like, I'm happy to respond to Mr. Castillo on the number of notices and what Frontier was doing based on what we understand. But that may be for later today. Thank you, Your Honor.

THE COURT: All right. I'm going to enter an opinion and an order denying Frontier's motion for judgment on the pleadings. I hope to do that by the end of the day today. All of my reasons will be explained in the opinion.

So that raises the question of where are we now? And we have tomorrow a Zoom hearing. I don't know whether you're all going to be in town or not, or whether you're flying out today or not. It's scheduled as a Zoom hearing. We have to deal with a small number of objections to the production of the subscriber information.

I gather from the correspondence that I saw yesterday that the PII with respect to any subscribers who did not object has already been produced. Am I correct in that Mr. Culpepper?

MR. CULPEPPER: For the most part, yes. We have a small dispute (indiscernible) an issue that we'll discuss tomorrow.

THE COURT: Maybe you should go up to the microphone. Just so I -- I just want a clear record.

MR. CULPEPPER: Kerry Culpepper. Yes, for the most part, the PII has been produced. We have a small dispute regarding some other IP addresses and some other minor issues.

THE COURT: All right, so it's a relatively -- I anticipate a relatively short hearing, which was noticed by Zoom, and I'm happy to go forward on that basis. If you're going to be here, I'm happy to do it as a hybrid hearing with some of you here.

Here's my question. I want to set a fact discovery cut off and an expert witness discovery cutoff. In reviewing the prior case management orders, it's unclear that I've ever set those dates, but I want to do that tomorrow. So I want you all to meet and confer. You're physically here. You can do it -- you can stay in my courtroom and talk if you want for a while, or you can adjourn to someone else's office to do that.

You know, I have some correspondence dealing with discovery, ongoing discovery, whether they're real ongoing or not. My intention is to push you all hard to complete all fact and expert discovery. When discovery issues have been raised with me using my procedures of, you know, a Zoom hearing, they've gotten resolved immediately. Which should give you all the message that, resolve it yourself quickly.

And my goal would be if you don't all settle --

which would be nice -- would be to have a trial in August. And I'm going to be extremely impatient about any discovery issues that would prevent that from happening. You've been at the discovery for quite some time now. I don't know how many depositions have been taken, if any. I don't know what -- you know, I've seen in correspondence about volume of documents, electronic or paper, that have been produced.

But I really -- you know, tomorrow -- I'm going to give you all a chance to talk about it this afternoon and tomorrow. I want to hear, you know, precisely when I'm going to set a fact discovery cut off and an expert. I don't know whether you've moved forward in finding your experts or not. You know, Mr. Oppenheim, you've been dealing with these kinds of cases elsewhere. But the case is either going to settle or it's going to be -- or we're going to have a trial.

And the way I ordinarily conduct trials is to have written direct declarations with live in-court cross-examination. You know, it always raises an issue if you're going to call witnesses who aren't under your control, you can't put it the written direct, but that has never been an enormous impediment, in my view.

Other general guidelines about the way I conduct trials, because there's no jury, I have a strong preference that, you know, if -- witnesses only testify once, so

they're not recalled in the other side's case. You do your full -- objections to -- it's beyond the scope of the direct usually do not apply in my trials. You do the whole examination. You know, every once in a while, somebody's had to recall a witness on an issue that wasn't anticipated.

But my preference is you discuss with each other, you agree on the order in which witnesses are going to testify, you try and do the entirety of a witness's testimony without issues about whether it's beyond the scope of the direct or not.

The other thing that I've often done in trials that are going to go more than a couple of days -- I won't give you the exact bright line -- is I do timed trials, that we agree in advance to an allocation of time each side uses it for opening statements, direct, cross-examination. With closing argument with cases that have more legal issues, I've usually permitted post-trial briefing and then you do closing arguments after the briefs are all in. I'm not saying it absolutely has to be that way, but that's how it's worked quite well in the longer and more complicated trials.

I have a form of joint pretrial conference order. This is -- I understand this is a contested matter, but I've applied this in both adversary proceedings and contested matters. There's a form, a template for my joint pretrial conference order, that's on the court's website, public

website, under my chamber's rules. You can find it there. And I do insist that, you know, all exhibits, witnesses, et cetera, everything is disclosed, the parties' contentions that supersede what's in the pleadings, et cetera.

But I'm telling you all that now, but really what I want to do tomorrow is I intend to set a date -- deadline for fact and expert discovery. I raised the question quite some time ago whether the parties had attempted mediation. And I'm not -- I heard what you all said. I'm not clear on what the answer is. And you know, it usually... What I found over the last seven years, cases usually settle really early, or they settle when we're getting pretty close to trial. Okay. And I consider this to fall in the latter. And that's because cases are more likely to settle when everybody's playing on a level playing field. You know essentially what the evidence is and you've all sort of indicated you thought you knew that already, but...

And I typically don't delay deadlines for completing fact or expert discovery because of mediation. I really want to push this through and get this done one way or the other. And you'll either settle or you won't settle, or you'll either mediate or you won't. I'm not going to force you to mediate it, but it would to be -- to make a lot of sense. And the most useful mediator in this case would probably be somebody who actually has familiarity with these

kinds of claims and defenses.

Does anybody want to say anything now? Anyway, I am pressing you. I'll try and get my opinion out so you will all have a chance to read and digest it before tomorrow. I guess the hearing's at 3:00. We'll deal very quickly with the handful of objections on PII.

Mr. Oppenheim?

MR. OPPENHEIM: So we had raised in a letter to Your Honor several -- we had provided a status update on discovery. And two of the issues have ripe issues we've raised with opposing counsel and gotten no response. Did you want to deal with those tomorrow, or do you want to deal with those today?

THE COURT: Well, I'm not going to --

MR. OPPENHEIM: They are --

THE COURT: --rule today. Tell me what you think the two issues are. I have the correspondence. Like, I've got copies of it here. But I'm mostly focused today on getting ready for this argument (indiscernible).

MR. OPPENHEIM: Of course, as did we, Your Honor. But we wanted to make sure we updated the Court because Plaintiff has -- sorry -- record company claimants have been trying to move the discovery process along.

In the some of the discovery received from Defendants they've redacted out all of the employee -- it

seems like all of the employee names, after this Court could not have been more clear about redactions at the last hearing we had, and we've raised the issue. We got zero response.

THE COURT: And I read it. I saw it. You all ought to take one more crack this afternoon at resolving that issue as well. I'm going to give you a chance to resolve it yourself before I have to resolve it tomorrow. It isn't going to take me long to resolve it.

MR. OPPENHEIM: The second ripe issue was the source code that described how Frontier handled notices, which in light of what Mr. Castillo got up and argued in terms of what Frontier was doing about investigations and analysis after they received notices, for which we've never seen a single document suggesting any of that --

THE COURT: You'll forgive me, but I think I pressed Mr. Castillo about what was the investigation like; I got absolutely no information.

MR. OPPENHEIM: Well, it...

THE COURT: So they'd better be forthcoming on it. If that's the defense they're relying on, it better be an open book.

MR. OPPENHEIM: So the prior versions of this source code will tell us exactly what their automated system was set to do in response to notices. So Mr. Castillo said

I was wrong about an email going out --

THE COURT: No, let's deal with -- we'll deal with this tomorrow.

MR. OPPENHEIM: Very well, Your Honor.

THE COURT: I don't want to -- because I've got something at noon. I don't want to take more time --

MR. OPPENHEIM: So that was my question.

THE COURT: -- with the argument.

MR. OPPENHEIM: We will stay and meet and confer on the schedule. And Plaintiffs want to move this case as fast as possible. Given where we are in discovery, the idea of an August trial, it's hard for me to imagine, given where we are with discovery, but we'll --

THE COURT: Well, they better get real about discovery because I really want this trial in August. Okay? Everybody understand? Everybody should understand. When you meet and confer, you'd better resolve these discovery issues or I'm going to resolve them quickly and we're going to have a trial in August.

MR. OPPENHEIM: I am kindly reminded. So I have to be back in Washington tomorrow, but I will participate by Zoom, if that's all right, Your Honor.

THE COURT: That's fine. It's scheduled as a Zoom hearing. I just raised it because --

MR. OPPENHEIM: Normally I prefer to do them in

person. I just can't --

THE COURT: Mr. Oppenheim? I have no problem whatsoever about it. Okay? All right. Mr. Culpepper?

MR. CULPEPPER: Kerry Culpepper. Quick question? Your Honor mentioned that there are written direct declarations, live cross-examinations?

THE COURT: Yes.

MR. CULPEPPER: Is Your Honor open to remote appearances, like as we're using Zoom for the trial?

THE COURT: I guess... Preferably not. So I think it's Rule 43(a) of the Federal Rules of Civil Procedure deals with provisions for remote testimony at trial. I have invoked it. You know, Federal Judiciary's policy with respect to remote hearings changed last September when the Judicial Conference determined that the pandemic emergency was over. And the policy restricts the use of remote hearings. It's been still recognized. Bankruptcy is a little different, but for trials I don't believe it is.

So with -- I think I'm correct, it's 4(a) of the Federal Rules of Civil Procedure. I've invoked it and permitted remote testimony in a number of limited circumstances in the last few months, and it's typically where the remote testimony was not on a super important issue and both -- all sides agreed consent.

I have to find compelling circumstances in order to permit remote testimony. I'm not going to rule it out it in the abstract. I would suggest that it's something when you -- if there are specific witnesses that you want to have testify remotely, I mean, I -- you know, I've had circumstances where there's illness or people in distant parts of the world and no one objected, I permitted them. But my strong preference is the witness chair. Okay?

MR. CULPEPPER: Understood, Your Honor. Just the important point to keep in mind is Frontier has customers all over the United States, meaning in Texas, Florida, other states.

THE COURT: Look, if a witness is outside the subpoena range of the Court and is not an employee of Frontier, you know, they can testify by deposition. You know, there are provisions for -- in Federal Civil Procedure apply in Bankruptcy Court in terms of trials. And so if a witness is out of -- outside the control of one of the parties and is outside the subpoena range, you can take their deposition. Take a video deposition if you want, or not. You know, I don't know what you're going to have them testify about but. So I thought the issue you were raising was much more focused on employees of your clients than over third parties, which neither of the -- none of the parties in this case control. And the Federal Rules deal with that.

MR. CULPEPPER: I understand, Your Honor. And lastly, my understanding was the discovery cutoff was June of this year. Your Honor issued a case management order, I believe, in December saying that six months from the order would be the cutoff.

THE COURT: Well, I went back and I saw -- I thought that six months should be enough. But I -- you know, in light of what's happened subsequently, I don't think -- are you telling me discovery is done?

MR. CULPEPPER: No. Nothing -- another thing to search on.

THE COURT: Okay. Well, let's go to trial next, okay? When we're done with the hearing tomorrow, you're going to have a deadline to complete fact discovery and expert discovery. Let's put it that way. And it will be a very clear order. I went back and looked at case management order 1 and some other orders, and it wasn't crystal clear to me. And there have been a number of discovery disputes. So you will -- the end of the day tomorrow you will know what is the cutoff of fact discovery and what is the cutoff of expert discovery.

MR. CULPEPPER: Thank you very much, Your Honor.

THE COURT: Okay.

MR. TWARDY: May I speak?

THE COURT: Yeah, please go ahead.

MR. TWARDY: Your Honor, I would like to introduce myself. I'm Stanley Twardy, Jr., from the law firm of Day Pitney.

THE COURT: You're new to the party.

MR. TWARDY: I am new to the party.

THE COURT: I saw your notice of appearance and --

MR. TWARDY: Yes, sir. I entered an appearance. You're going to see more of me today, Your Honor, which is why I wanted to -- you're going to be seeing me more this week (indiscernible) Your Honor. Mr. Castillo is retiring. Our firm is going to be taking a larger role, together with Akerman firm going ford, but I just wanted to introduce myself to you and --

THE COURT: Okay. Mr. Castillo, when do you retire?

MR. CASTILLO: This week, Your Honor.

THE COURT: Oh. You won't be here for an August trial. You won't be here for August trial. Okay.

MR. CASTILLO: Thank you.

MR. TWARDY: Thank you, Your Honor.

THE COURT: Thank you very much. All right. Anything else that anybody else wants to raise?

MR. OPPENHEIM: Not from Plaintiffs.

THE COURT: All right. I will try -- I've got to do some tinkering with a draft of a written opinion. I'll

try and get it out so you'll all see it before the hearing tomorrow afternoon. You'll be able to hopefully digest it. And you're all welcome to stay and talk about discovery, but let's leave it at that. Thank you very much for the -- thank you. The briefing was really excellent on this. I appreciated it. It's not the everyday fare of the Bankruptcy Court. Let's put it that way.

(Whereupon these proceedings were concluded at 11:37 AM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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